Sup

EMPRES

PETITIO
UN

INDEX

Page

Opinion Below 1

Jurisdiction 1

Questions Presented:

1. Whether 33 U.S.C. § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act which purports to relieve the shipowner from liability in damages for acts or omissions of the stevedore, requires the finder of fact to evaluate and ascertain the percentages of fault of the concurrently negligent stevedore and reduce the plaintiff/longshoreman's recovery against the shipowner accordingly. [This question will in general be referred to as the "equitable credit or proportional fault issue."] 2

2. Whether under the 1972 Amendments to 33 U.S.C. § 905(b) which abrogated a longshoreman's cause of action based upon the warranty against unseaworthiness, the shipowner is liable for injuries to an employee of an independent contractor when the danger presented at the place of work on the ship is open and obvious and known to the stevedore supervisory employees, and the ability to mitigate the dangers of the condition is within the control and cons-

	Page
...OLVED	3
...	3
... WRIT:	
...W IS SHARPLY IN CONFLICT ...OTHER COURTS OF APPEALS ..	5
... Circuit versus Fourth Cir- ...e Credit Question. Certiorari ... review this conflict in *Ed-* ...79 on November 6, 1978 ...	6
...versus Second Circuit on ...re Question	7
...rsus Land-based Negligence ...	9
... THIS COURT ARE IN APPAR- ...	12
...OLVES IMPORTANT QUESTIONS ...RPRETATION IN WHAT CON- ...S FEDERAL LAW. THE DECI- ...S OF APPEAL ARE IN DISARRAY ...CAN ONLY BE RESOLVED BY ... OF THIS COURT	14
...	16

	Page
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed. 2d 694 (U.S. 1974)	12, 13, 14
Cox v. *Flota Mercante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978), cert. denied, Case No. 78-72 ...	8, 9
Crane v. *I.T.E. Circuit Breaker Co.*, 278 A.2d 362 (Pa. 1971)	11
Crawford Johnson & Co. v. *Duffner*, 189 So.2d 474 (Ala. 1966)	11
Croley v. *Matson Navigation Co.*, 313 F.Supp. 555 (S.D. Ala. 1969), rev'd on other grounds, 434 F.2d 73 (5th Cir. 1970)	11
Delhi-Taylor Oil Corp. v. *Henry*, 416 S.W. 2d 390 (Tex. 1967)	11
Dodge v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed. 2d 188 (1976)	6, 12, 13
Edmonds v. *Compagnie Generale Transatlantique*, 557 F.2d 1153 (4th Cir. 1978), cert. granted No. 78-479 on November 6, 1978	6, 7, 12, 14, 15
Florida Power & Light Co. v. *Robinson*, 68 So.2d 406 (Fla. 1953)	11
Gay v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977)	8
Grace v. *Henry Disston & Sons, Inc.*, 85 A.2d 118 (Pa. 1952)	11
Gulf Oil Corp. v. *Bivins*, 276 F.2d 753 (5th Cir. 1960), cert. denied, 364 U.S. 835, 81 S.Ct. 70, 5 L.Ed. 2d 61, rehearing denied, 364 U.S. 906, 81 S.Ct. 231, 5	

Page

Lake Parker Mall, Inc. v. *Carson,* 327 So.2d 121 (Fla. App. 1976) 11
Landon v. *Lief Hoegh and Co., Inc.,* 521 F.2d 756 (2d Cir. 1975), cert. denied 423 U.S. 1053 (1976) 12, 13
Levesque v. *Fraser Paper Ltd.,* 189 A.2d 375 (Me. 1963) 11
Marant v. *Farrell Lines, Inc.,* 550 F.2d 142 (3d Cir. 1977) 7
Miles v. *Shell Oil Co.,* 498 F.2d 105 (5th Cir. 1974) ... 11
Pope & Talbot, Inc. v. *Hawn,* 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (U.S. 1953) 12, 13
Pruett v. *Precision Plumbing, Inc.,* 554 P.2d 655 (Ariz. App. 1976) 11
Ryan Stevedoring Co. Inc. v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) 6, 13
Samuels v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir. 1978) ....*passim*
Schwarz v. *General Electric Realty Corp.,* 126 N.E. 2d 906 (Ohio 1955) 11
Seas Shipping Co. v. *Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) 5-6
Seeney v. *Dover Country Club Apartments, Inc.,* 318 A.2d 619 (Del. App. 1974) 11
Shellman v. *United States Lines,* 528 F.2d 675 (9th Cir. 1975), cert. denied. 425 U.S. 936, 96 S.Ct. 1668, 48 L.Ed. 2d 177 (1976) 6, 12, 13
Storm v. *New York Telephone Co.,* 270 N.Y. 103, 200 N.E. 659 (N.Y. 1936) 11
Turner v. *West Texas Utilities Co.,* 290 F.2d 191 (5th Cir. 1961), cert. denied

Supr

EMPRESA

PETITION
UNI

The peti
tinas respe
to review
States Cou

for rehearing en banc was denied
and this petition for certiorari wa
of that date. This Court's jurisdic
28 U.S.C. § 1254(1).

QUESTIONS PRESE

1. Whether 33 U.S.C. § 905(b)
men's and Harbor Workers' Com
purports to relieve the shipown
damages for acts or omissions of th
the finder of fact to evaluate and a
age of fault of the concurrently
and reduce the plaintiff/longs
against the shipowner accordingly
in general be referred to as the
proportional fault issue."]

2. Whether under the 1972 Amen
§ 905(b) which abrogated a longs
action based upon the warranty a
ness, the shipowner is liable for inj
of an independent contractor wh
sented at the place of work on the
vious and known to the stevedore
ees, an the ability to mitigate the

isory personnel to relay the warning or knowl-
the employees.

second and third questions will generally be d to as the "care standard issues."]

STATUTORY PROVISIONS INVOLVED

ed States Code, Title 33 § 905(b):

'In the event of injury to a person covered un- this Act caused by the negligence of a vessel, n such person, or anyone otherwise entitled to over damages by reason thereof, may bring an ion against such vessel as a third party in ac- dance with the provisions of section 33 of this , and the employer shall not be liable to the sel for such damages directly or indirectly and agreements or warranties to the contrary shall void. If such person was employed by the vessel provide stevedoring services, no such action shall permitted if the injury was caused by the negli- ce of persons engaged in providing stevedoring vices to the vessel. If such person was employed the vessel to provide ship building or repair vices, no such action shall be permitted if the in- was caused by the negligence of persons en- ed in providing shipbuilding or repair services he vessel. The liability of the vessel under this

> "The vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." H.R. Rep. No. 1441, 92d Cong., 2d Sess., [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4702-05.

On the standard of care issue, a direct conflict exists between the Fifth Circuit in *Samuels* and the Second Circuit in *Cox* v. *Flota Mercante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978), cert. denied by the United States Supreme Court in Case No. 78-72 on October 2, 1978.

Indicative of the conflict is that both of these circuits purport to follow Restatement (Second) of Torts §§ 342, 343 and 343A as setting the standards for determining what is shipowner negligence under 33 U.S.C. § 905(b). *Gay* v. *Ocean Transport & Trading Ltd.,* 546 F.2d 1233 (5th Cir. 1977); *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka Zvir,* 570 F.2d 449 (2d Cir. 1978). Yet these two Courts apply the standard with contradictory results.

In the Second Circuit *Cox* case, a vessel hatch beam could not be pinned or locked into place because of the

based law that a warning to
ment is sufficien

For instance in *Gulf Oil*
753 (5th Cir. 1960), cert. de
70, 5 L.Ed. 2d 61, rehearin
S.Ct. 231, 5 L.Ed. 2d 199 (U.

> "The owner or occup
> has a duty to warn the
> ent contractor who has
> the property, of dange
> inhere in that property,
> *charged if those in char*
> *dependent contractor a*
> *knowledge of the dang*
> *supervisors in employm*
> *son.*"

It should be noted that
Bivins was applying Restat
§ 342 as it also purported to

The landowner has the ri
tractor's supervisory person
knowledge about a dangerou

ard Air Line Railroad Co., 222 F.2d 57 (4th Cir. 955) Georgia law; *Brown* v. *American Cyanamid & hemical Corp.,* 372 F.Supp. 311 (S.D. Ga. 1973); *roley* v. *Matson Navigation Co.,* 313 F.Supp. 555 S.D. Ala. 1969), rev'd on other grounds, 434 F.2d 73 5th Cir. 1970)—Alabama law; *Kelley* v. *General Telephone Co. of the Southwest,* 498 F.2d 105 (5th Cir. 974)—Texas law; *Miles* v. *Shell Oil Co.,* 498 F.2d 105 5th Cir. 1974)—Texas law; *Hobart* v. *Sohio Petroleum Co.,* 255 F.Supp. 972 (N.D. Miss. 1966) aff'd 376 2d 1011 (5th Cir. 1967)—Mississippi law; *Storm* v. *ew York Telephone Co.,* 270 N.Y. 103, 200 N.E. 659 N.Y. 1936); *Schwartz* v. *General Electric Realty orp.,* 126 N.E. 2d 906 (Ohio 1955); *Hotel Operating* . v. *Saunders' Adm'r.,* 141 S.W. 2d 260 (Ky. 1940); *unt* v. *Laclede Gas Co.,* 406 S.W. 2d 33 (Mo. 1966); *race* v. *Henry Disston & Sons, Inc.,* 85 A.2d 118 Pa. 1952); *Crane* v. *I.T.E. Circuit Breaker Co.,* 278 2d 362 (Pa. 1971); *American Mut. Liability Ins. Co. Boston* v. *Chain Belt Co.,* 271 N.W. 828 (Wis. 1937); *kovich* v. *Peoples Gas Light and Coke Co.,* 195 N.E. 260 (Ill. App. 1963); *Pruett* v. *Precision Plumbing, c.,* 554 P.2d 655 (Ariz. App. 1976); *Citizen's Utility* c. v. *Livingston,* 515 P.2d 345 (Ariz. App. 1973);

s Court Are in Apparent Conflict.

he law is unmistakeably toward
ility according to fault. This
oring Co. v. *Fritz Kopke, Inc.,*
74, 40 L.Ed. 2d 694 (U.S. 1974)
based upon comparative fault
not statutorily immune in non-
nited States v. *Reliable Trans-*
5 S.Ct. 1708, 44 L.Ed. 2d (U.S.
damages to be allocated in di-
relative fault of the vessels in-

ion to date refusing to reduce
nst third parties when the in-
r is concurrently negligent has
Haenn Ship Ceiling & Refitting
S.Ct. 277, 96 L.Ed. 318 (U.S.
ot, Inc. v. *Hawn,* 346 U.S. 406,
143 (U.S. 1953) and *Cooper*
z Kopke, Inc., 417 U.S. 106, 94
694 (U.S. 1974). See *Zapico* v.
.2d 714, 724-725 (2d Cir. 1978);
nd Co., Inc., 521 F.2d 756, 759-

Court's opinion in *Reliable Transfer* which advocated the allocation of "liability for damages according to comparative fault whenever possible." 421 U.S. at 411. While *Reliable Transfer* was decided two days before argument of the appeal in *Landon,* it was cited in neither that case nor in the subsequent appellate opinions in *Samuels, Shellman,* or *Dodge.* Judge Friendly cites *Reliable Transfer* in *Zapico,* 579 F.2d at 725, but only for a proposition totally unrelated to the apportionment of fault holding for which *Reliable Transfer* is best known.

The *Halcyon* and *Hawn* precedents are more than a quarter of a century old. In the interim there have been vast changes in the Longshoremen's and Harbor Workers' Compensation Act by virtue of the 1972 Amendments; the Supreme Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.,* 417 U.S. 106, 94 S.Ct. 2174 (1974) has specifically held that the doctrine of contribution applies in non-collision admiralty actions, thus emasculating the primary holding of *Halcyon*; and indemnity jurisprudence based on *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.,* 350 U.S. 124, 76 S.Ct. 232 (1956) and its warranty of workmanlike service was

or *Cooper Stevedoring* was the Court called upon to determine the validity of a credit defense such as that approved by the Fourth Circuit in *Edmonds*.

Regardless of the distinguishing features of these Supreme Court cases, each provides some guidance by analogy. Where, as here, the guidance is inconsistent, it is appropriate for this Court to step in and eliminate any discrepancies through a clear directive to the courts below. This is particularly true in this instance since "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime. . . ." *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. at 409.

3. The Conflict Involves Important Questions of Statutory Interpretation in What Congress Designated as Federal Law. The Decisions of the Courts of Appeal Are in Disarray and the Conflict Can Only Be Resolved by the Prompt Action of This Court.

Congress intended that legal questions arising in actions brought under the Longshoremen's and Harbor Workers' Compensation Act are to be determined as a matter of federal law.[1]

certainty and uniformity sought b
maritime community.

CONCLUSION

Petitioner respectfully urges t
granting the writ are significant: t
tions of the interpretation of the f
be reviewed and decided by this Co
ity will be restored to all maritime

Respectfully submi

NATHANIEL G.
P. O. Box 143
Tampa, Florid
Tel: (813) 22

Attorney for P

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.

Of Counsel

November 13, 1978

APPENDIX

beams abutted only three sides of the stanchion-ladder, there was a space behind the ladder as wide as the ladder, described variously by the witnesses as from 16 inches to 2½ feet in width. On April 13, 1973, at 9:30 p. m., the plaintiff slipped or stepped backwards into this void after getting a drink of water from a cooler.

There was evidence that the stevedore foreman and one or more of the other longshoremen knew of the hole; but there was evidence that the plaintiff himself did not know of it, and that it had never been called to his attenion. There was no dunnage over the cavity. The opening would have been open and obvious had the area been well lighted.

The ship was being unloaded at night. It had no fixed or permanent lights under the tween deck of the lower hold. Therefore, it was necessary to use drop lights arranged in a cluster beneath a reflector to provide sufficient illumination for the work to proceed. The lights were provided by the ship but placed by the stevedore's personnel. One was placed on each of the four corners of the hatch opening. This provided enough light to enable the men to work.

The degree of illumination, however, was not clearly established. Some witnesses testified that they could see the hole into which the plaintiff fell; another that it was obscure; one testified that the level of illumination was

against a vessel sued pursuan
after considerable discussion,
Fourth Circuit in *Edmonds v.*
atlantique, 4 Cir. 1977, 558 I
granted June 3, 1977, held tha
to be "confined to its own negli
utory fault on the part of the e
tiff's recovery should be redu
ployer's negligence. The plain
the compensation he has recei
recoup what he has paid fron
subrogation provision of the I
Worker's Compensation Act, 3

The rationale for not reducin
ery because of his employer's
the Ninth Circuit's in *Dodge v.*
Tokyo, 9 Cir. 1975, 528 F.2d 66
944, 96 S.Ct. 1685, 48 L.Ed.2d 18
States Lines, Inc., 9 Cir. 1975,
1976, 425 U.S. 936, 96 S.Ct. 166
conclusion was reached (in dic
Landon v. Lief Hoegh & Co., 2
cert. denied sub nom., 1976, 42
L.Ed.2d 642.

The Third Circuit has disc

Circuit allowed what has come to be known as the "Murray Credit" and allowed the tortfeasor in a common law tort action to claim a 50 precent credit if the compensation-covered plaintiff's employer were found to be contributorily negligent. *Murray* v. *United States,* 1968, 132 U.S.App.D.C. 91, 405 F.2d 1361. It later extended the same principle to an employee-plaintiff covered by the Longshoremen's and Harbor Workers' Compensation Act. *Dawson v. Contractors Transport Corp.,* 1972, 151 U.S.App.D.C. 401, 467 F.2d 727, a pre-1972 amendment case.

In addition, a number of legal scholars have probed for a solution. Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments, etc., 1976, 7 Journal of Maritime Law and Commerce, 447, 480, *et seq.*; Cohen and Dougherty, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 1974, 19 N.Y.L. Forum 587; Shorter, In the Wake of the 1972 Amendments ot the L. & H.W. C.A.: The Vessel's Rights Against the Stevedore, 1976, 7 J. of Mar.L. & Com. 671; Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen Against Shipowners—A Proposed Solution, 1976, 37 Ohio St.L.J. 767; Coleman and Daly, Equitable Credit: Appor-

ssions would merely further prolif- We adhere to the logic of the Ninth

conclusion, we start with the pre- the employer is immune to suit for on by the vessel. 33 U.S.C. § 905; *stern Transmission Corp.*, 5 Cir. *. denied sub nom.*, 1976, 423 U.S. Ed.2d 638; *Aetna Casualty & Surety ng, Inc.*, 5 Cir. 1973, 490 F.2d 299. o the Longshoremen's and Harbor Act evidence no intention of over- *Haenn Ship Ceiling & Refitting* 72 S.Ct. 277, 96 L.Ed. 318. *Cooper Fritz Kopke, Inc.*, 1974, 417 U.S. .Ct. 2174, 2178, 40 L.Ed.2d 694.

gressional aims in 1972 were two- nseaworthiness action but leave in tion with promotion of shipboard s; (2) eliminate any form or ves- ttempt to shift liability (in whole indirectly) to the stevedore. *See* ar.L. & Com. at 484-85. Permitting ne these aims by effectuating with- of a shipowner contribution action

Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, and the longshoreman's compensation benefits were increased and the geographic area of coverage expanded. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 1977, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320. It is not apparent that the vessel owner was saddled with a disproportionate burden under the scheme. The plaintiff's recovery is still reduced proportionately to his own fault, *Pope and Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143; *see Edmonds, supra*, 558 F.2d at 189; *Dodge, supra*, 528 F.2d at 673; *Landon, supra*, 521 F.2d at 760, and the Act does not prevent the shipowner from seeking either contribution or indemnity from third persons other than from a covered plaintiff's employer. But the Act does mandate that the employer's exclusive liability will be compensation under the Act.

If there is a further adjustment to be made when the vessel's common law negligence is concurrent with the plaintiff's employer's negligence, the decision is for the Congress. Allowing an offset or credit raises questions best decided by a legislative body which can account for factors that we may not appropriately consider: what kind of employer negligence reduces the longshoreman's recovery: common law or maritime? [That is, should the standards of judging employer negligence be the same as those applicable to the